UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

HENRY KINGSBURY, Plaintiff,	:	
v.	:	CA 02-068L
BROWN UNIVERSITY, Defendant.	:	

REPORT AND RECOMMENDATION

David L. Martin, United States Magistrate Judge

Before the court is the motion of Defendant Brown University ("Brown" or "Defendant") for summary judgment pursuant to Fed. R. Civ. P. 56. Plaintiff Henry Kingsbury ("Plaintiff" or "Kingsbury") has objected to the motion. This matter has been referred to me for preliminary review, findings, and recommended disposition pursuant to 28 U.S.C. § 636(b)(1)(B) and D.R.I. Local R. 32(a). A hearing was conducted on March 11, 2003. After listening to oral argument, reviewing the memoranda submitted,[1] and performing independent research, I recommend that the motion be denied.

Overview

This is an employment discrimination action brought under

[1] Plaintiff's use of single spacing and what appears to be 11 point font for his filings has made the court's work exceedingly taxing. Presumably, Plaintiff chose this format as a means of complying with the court's page limitation requirements. If so, Plaintiff should have filed instead a motion for permission to exceed those limits. It is only out of consideration for Plaintiff's pro se status that the court has refrained from declaring Plaintiff's finely printed filings an excessive imposition and declining to read them further. Plaintiff is strongly advised that in the future all his filings should be in at least 12 point font and should be double spaced.

the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-12213. See Complaint ¶ 1. Plaintiff was formerly employed by Brown as an assistant professor of Music. See id. ¶ 6. He alleges that Brown discriminated against him on the basis of a disability resulting from brain surgery for removal of tumor, see id. ¶¶ 7, 60, and also retaliated against him for having filed a previous charge of discrimination, see id. ¶¶ 61-71. Plaintiff's claim of discrimination arises from Brown's failure to renew his three year teaching contract when it expired on June 30, 1997. See id. ¶¶ 49-50. Plaintiff's retaliation claim is based on a 1994 reprimand for alleged sexual harassment, see id. ¶¶ 40-41, which Brown later used as a ground for not renewing Plaintiff's contract, see id. ¶¶ 46, 50.

As explained herein, I find that Plaintiff has made a substantial showing that the reasons given by Brown for not renewing his contract were false. See Williams v. Raytheon Co., 220 F.3d 16, 19 (1st Cir. 2000)(holding that in employment discrimination case the issue at summary judgment is whether plaintiff has "made a substantial showing that the reason given for [his] termination was false"). I also find that there is evidence in the record which would permit a rational factfinder to conclude that Brown retaliated against Plaintiff for filing a charge of discrimination in 1994 by reprimanding him for alleged sexual harassment, and then using that reprimand as one of the grounds for refusing in 1996 to renew his employment contract. See Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 57 (1st Cir. 2000)(stating summary judgment standard for retaliation claim).

Facts[2]

The Initial Appointment

In July of 1990, Kingsbury was appointed to the Brown University faculty as a visiting adjunct assistant professor of Music. See Plaintiff's Exhibit ("Ex.") E (Mem. from Stultz to Rothman of 7/14/96) at 2.[3] This was a half time position which ran for twelve months. See id. In October of 1990, he was appointed to a regular assistant professorship in Brown's Music Department with a three year term running from July 1, 1991, to June 30, 1994.[4] See Plaintiff's Ex. U (Faculty

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[2] Plaintiff did not file a "concise statement of all material facts as to which he contends there is a genuine issue necessary to be litigated," as required by D.R.I. Local R. 12.1(a)(2), but instead filed a document entitled Plaintiff's Statement of Undisputed Facts ("Plaintiff's SUF"). At the March 11, 2003, hearing the court stated that it would treat Plaintiff's SUF as Plaintiff's statement of material facts as to which there is a genuine issue necessary to be litigated. However, the court also directed that Plaintiff file an additional response to Defendant's Statement of Undisputed Material Facts in Support of Defendant's Motion for Summary Judgment ("Brown's SUF"), stating whether he agreed or disagreed with each of the numbered averments in Brown's SUF. Plaintiff did so on March 14, 2003. See Plaintiff's Further Response to Defendant's Statement of Undisputed Facts ("Response to Brown's SUF").

[3] Plaintiff's exhibits were filed as part of Plaintiff's SUF. Brown's exhibits were filed with its Memorandum of Law in Support of Motion for Summary Judgment ("Brown's Mem.") and with the Affidavit of James Baker ("Baker Aff."). For brevity and clarity, the court cites exhibits simply as either Plaintiff's Ex. or Brown's Ex.

Plaintiff's Ex. Y and Brown's Ex. 6 are the same document. The same is true for Plaintiff's Ex. L at 2 and Brown's Ex. 14 at 20. Again for brevity, where there are duplicate exhibits, the court cites to only one.

[4] The court is aware that Brown's SUF ¶ 1 states that Kingsbury was hired as assistant professor of Music in October of 1991, see Brown's SUF ¶ 1, and that Kingsbury in his Response to Brown's SUF agrees with this statement. See Response to Brown's SUF ¶ 1. However, the court believes that the parties are mistaken as to the year of Kingsbury's appointment as a regular assistant professor and that the correct date is October of 1990. Plaintiff's Ex. U (Faculty

Position Authorization).

The Brain Tumor

At the beginning of September 1991, Kingsbury was discovered to have a brain tumor, see Plaintiff's SUF Chronology at 1;[5] Brown's SUF ¶ 2, and he underwent surgery on October 8, 1991. See Complaint ¶ 7; Brown Ex. 3 (Mem. form Kingsbury to Baker of 10/9/95) at 1. Complications following the operation left Kingsbury with impaired vision and speech, see Complaint ¶ 7, and he was placed on medical leave by Brown, see id. ¶ 8.

Eighteen months later, in April 1993, Kingsbury requested that he be reinstated from medical leave. See id. ¶ 13; Brown's SUF ¶ 3. Brown asked him to submit to a medical examination, see Complaint ¶ 18, and he complied with this request, see id. ¶ 19; see also Brown's Ex. 14 at 16 (Dr. Glantz's Report of 6/14/93). Kingsbury was examined on June 14, 1993, by Dr. Michael Glantz, an assistant professor of neuro-oncology at Brown's School of Medicine. See Brown's Ex. 14 at 16. Dr. Glantz's report indicated that Kingsbury's "most prominent deficits," id. at 17, were impairments of his right visual field and cerebellar speech, see id. Dr. Glantz

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Position Authorization), which appears to be the document reflecting the action, is dated October of 1990. Also, Brown's date of October of 1991 is exactly one year later and suggests a typographical error in Brown's SUF ¶ 1 which escaped the notice of both parties.

While concluding that the correct date is October of 1990, the court is, nevertheless, aware that Plaintiff's Ex. E (Mem. from Stultz to Rothman of 7/14/94) at 2 indicates that Kingsbury was appointed to a three year term in April of 1991. Whether Kingsbury was appointed to the three year term in October of 1990, April of 1991, or October of 1991 does not affect the court's resolution of the instant motion.

[5] Plaintiff's SUF Chronology is a separate document from Plaintiff's SUF.

also opined that "[w]hile formal neuropsycho- logical testing would provide more substantive data, there is no outstanding impairment of higher intellectual functions apparent on office testing." Id.

In an August 12, 1993, letter to Brown's Dean of the Faculty, Bryan E. Shepp ("Dean Shepp"), Dr. Glantz summarized his findings:

> Professor Kingsbury has several neurologic problems. The most pertinent are his visual and speech deficits. Both of these are mild-to-moderate, and may still improve (albeit incompletely) even without specific treatment. They will affect Professor Kingsbury in some of his activities (reading and lecturing for example). How significant these impediments are in the setting of his academic obligations depends on the specific obligations. The results of formal neuro-psychological testing, and discussions with members of his Department, who are more familiar with the specific requirements of his position, would probably be helpful. From the perspective of my patient, I think a return to work is critical. I think the spectrum of activities Professor Kingsbury is able to participate in may be smaller than before his operation. I suggest writing out specific goals (for example: the completion of a pertinent research project and scholarly paper; submission of a grant; development of a new course). I would be glad to comment on a draft of those goals vis a vis Professor Kingsbury's neurologic deficits.

Brown's Ex. 14 at 14 (Letter from Glantz to Shepp of 8/12/93).

After receiving this letter, Dean Shepp orally notified Kingsbury on August 23, 1993, that he would not be allowed to return to active duty in September of that year.[6] See

[6] Although Kingsbury alleges that he would have been able to perform the duties of his position "with reasonable accommodation," Complaint ¶ 28, as of September, 1993, and that Brown's decision not

Complaint ¶ 21. On August 30, 1993, Dean Shepp sent Kingsbury a letter confirming that he "could not be reinstated at this time." Plaintiff's Ex. L[7] at 2 (Letter from Shepp to Kingsbury of 8/30/93). In the letter, Dean Shepp cited the fact that Dr. Glantz had reported that Kingsbury had "several substantial neurologic problems, including visual and speech deficits."

Id. Dean Shepp recounted that he had:

> discussed these results with the Provost ... and we noted that in Dr. Glantz's assessment these deficits would impede your **lecturing, reading, and attention to detail, which are principal duties of a teaching faculty member**. As a result, I informed you that you could not be reinstated at this time.

Id. (bold added).

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to reinstate him in August of 1993 was discriminatory, see id. ¶¶ 32, 56, he testified at his deposition that the alleged failure to provide reasonable accommodation is not part of the present action, see Brown's Ex., Kingsbury Deposition ("Dep.") of 11/18/02 at 36-37. Those claims (i.e., failure to provide reasonable accommodation and failure to reinstate in August of 1993) were the subject of a prior action in this court, Kingsbury v. Brown University, CA 01-448L ("Kingsbury I"), and were found to be time barred. See Kingsbury I (Order entered Mar. 1, 2002)(Lagueux, J.), aff'd, C.A. No. 02-1374 (1st Cir. Oct. 17, 2002); see also Brown's SUF ¶¶ 31-32, 36; Response to Brown's SUF ¶¶ 31-32, 36. The doctrine of res judicata prohibits their re-litigation here. See Havercombe v. Dep't of Educ. of the Commonwealth of Puerto Rico, 250 F.3d 1, 3 (1st Cir. 2001); Dowd v. St. Columbian's Retirement House, Civ. A. No. 93-0265B, 1993 WL 762585, at *4 (D.R.I. Sept. 9, 1993).

The prior charge of discrimination filed in Kingsbury I, however, is relevant to the present action in that Kingsbury contends that Brown retaliated against him for filing it by reprimanding him for alleged sexual harassment and then used that reprimand as a reason for not renewing his contract when it expired. See Complaint ¶¶ 41, 47, 50.

[7] Plaintiff's Ex. L is actually two documents: L at 1 (Letter from Stultz to Kingsbury of 5/25/94) and L at 2 (Letter from Shepp to Kingsbury of 8/30/93).

Dean Shepp also indicated in the letter that Brown wanted another assessment of Kingsbury's neurological status because "Dr. Glantz has indicated to us that a formal neuropsychological examination would be necessary to provide us with details of your range of deficits and how they would impinge on your major duties as a professor of Music." Id. Accordingly, Dean Shepp requested that Kingsbury either authorize the release of a recent neurological examination or arrange to take a new one. See id.

In response to this request, Kingsbury's previous attorney provided Brown with a copy of a March 18, 1993, neuro-psychological evaluation performed by Dr. Charles E. Folkers. See Plaintiff's Ex. J (Letter from Shepp to Glantz of 11/1/93); see also Brown's Ex. 14 at 11 (Neuropsychological Evaluation of 3/18/93). Among other conclusions, Dr. Folkers opined that "[o]ver the past year, Mr. Kingsbury appears to have improved measurably in verbal memory and general cognitive functioning," Brown's Ex. 14 at 12, and that "[t]he test results give me no reason to believe that a successful return to work in academia is unlikely," id. at 13.

On October 8, 1993, Attorney Stephen J. Dennis, who was then representing Kingsbury, sent Dean Shepp a four page single spaced letter. See Plaintiff's Ex. N (Letter from Dennis to Shepp of 10/8/93). The letter, forceful if not blistering in tone (e.g., "your actions have been both reprehensible and illegal," id. at 2), asserted that Brown had illegally discriminated against Kingsbury because of his disability and demanded reinstatement to his prior position, back pay, attorney's fees, a letter of apology and reasonable accommodation, see id. at 4-5. Dennis' letter quoted language from R.I. Gen. Laws § 42-87-3(b) that "no otherwise qualified

handicapped person shall solely on the basis of handicap, who with reasonable accommodation and with no major cost can perform the essential functions of the job in question, be subjected to discrimination in employment ...." Id. at 2 (quoting R.I. Gen. Laws § 42-87-3(b)[8])(1993 Reenactment). The phrase "essential functions" appeared no less than eight times in the letter. See Plaintiff's Ex. N.

Shortly after receiving the letter from Attorney Dennis, Dean Shepp on October 20, 1993, telephoned Professor James Baker, who was then the Chairman of the Music Department. See Plaintiff's Ex. O (Mem. from Baker to Shepp of 10/21/93) at 1. Dean Shepp asked Baker to provide within twenty-four hours "a thorough breakdown of the tasks Henry Kingsbury would be expected to perform in his position," id., and specifically "address three main areas: teaching, advising, and research," id. Professor Baker sought advice from the senior faculty members in the Department, Professors David Josephson, Gerald Shapiro, (and presumably) Rose Subotnik, and Jeff Titon. See Plaintiff's Ex. O; see also Brown's Ex. 4 at 3. After compiling and organizing their input, Baker circulated several draft responses. See Plaintiff's Ex. O. Reacting to one of these drafts, Professor David Josephson e-mailed Baker on the

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[8] In 1993 R.I. Gen. Laws § 42-87-3 provided in part:

> (b) Notwithstanding any inconsistent terms of any collective bargaining agreement, no otherwise qualified handicapped person shall, solely on the basis of handicap, who with reasonable accommodation and with no major cost can perform **the essential functions of the job** in question, be subjected to discrimination in employment by any person or entity receiving financial assistance from the state, or doing business within the state.

R.I. Gen. Laws § 42-87-3 (1993 Reenactment)(bold added).

morning of October 21, 1993. Plaintiff's Ex. X. Directing his ire at the third paragraph of Baker's draft,[9] Josephson wrote:

> [Y]ou have given too much away before we have even begun negotiating Henry's duties .... If we allow Henry to return in order to fulfill only "the most essential obligations ... associated with teaching" we will condemn ourselves to handling the administrative tasks that support that teaching .... **Have we not done enough for Henry? When will it end, this generosity to a hostile, irrational, and damaged colleague at the expense of the rest of us. Enough!**

Id. (bold added)(second alteration in original).[10]

Later that day, October 21, 1993, Professor Baker sent Dean Shepp a three page memorandum, listing responsibilities in the three areas Dean Shepp had requested and adding a fourth area, "administration and service." Plaintiff's Ex. O at 1. In the memorandum, Baker stated specifically that the suggestions which he had received by e-mail from the other faculty members had been "incorporated into the document," id., and that all the senior faculty (except Professor Titon) had read and approved it, see id. The duties and tasks stated in the memorandum were subsequently incorporated in large

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[9] Professor Baker's draft is not part of the present record.

[10] The record also contains copies of earlier e-mails between Professor Josephson and Professor Baker regarding a colloquium presented by Kingsbury in October of 1992. See Brown's Ex. 14 at 1-2. Those e-mails reflect the professors' critical comments regarding Kingsbury's physical impairments (inability to control his eyes, slurred speech, weak voice, and lack of arm control) and perceived mental impairments (disorganized presentation, failure to maintain proper pace). See id. Professor Josephson, in the same e-mail in which he describes these handicaps, states "We must replace Henry next year." Id. at 1. Professor Baker, in responding to Josephson's e-mail, states "We have in fact settled on a course of action--although it is anything but quick and decisive." Id. at 2.

measure into a document entitled "Essential Functions of an Assistant Professor in Ethnomusicology/ Musicology" ("Essential Functions Statement" or "Statement"). See Brown's Ex. 1 (the Statement).

The evidence strongly suggests that there was no list of "essential functions" for the position held by Kingsbury prior to the creation of the Statement. See Plaintiff's Ex. P (Excerpt from Shepp Dep.). Dean Shepp testified that he suspected the reason there was no list of essential functions in existence as of May of 1993 was "that there was no perceived need for it at that time." Id. There was, however, a Faculty Position Authorization Form ("FPA Form" or "the Form"), which was executed when Kingsbury was appointed as a regular faculty member in October of 1990 for the three year term commencing July 1, 1991. See Plaintiff's Ex. U (FPA Form). Item 11 of the Form stated "Position requirements: (distinguish between those items which will be required and those which will be preferred)." Id.
Beneath the item the following is typed:

> We seek a music scholar holding the Ph.D. who will teach with distinction, enhance the intellectual life of the department, and contribute to our programs in music history and ethnomusicology. Teaching duties will include courses in musicology, among them the sequence of music history courses for undergraduate majors, as well as undergraduate and graduate courses in []ethnomusicology.

Id.[11]

[11] In addition, the record also contains a September 28, 1993, memorandum from Professor Baker to Professor Josephson in which Baker quotes a "list of university-wide goals for faculty," Brown's Ex. 14 at 8, authored by Dean Shepp and published in the summer issue of The Campaign Star. As quoted by Baker, Dean Shepp wrote:

On or about November 1, 1993, Dean Shepp sent the Essesntial Functions Statement to Dr. Glantz and asked him whether Kingsbury could "be expected to perform his duties as a faculty member of the Department of Music in a satisfactory fashion either with or without accommodation?" Plaintiff's Ex. J (Letter from Shepp to Glantz of 11/1/93). Dean Shepp indicated that Brown was trying to determine whether Kingsbury could return to duty at the beginning of the second semester. See id. at 2.

The Sexual Harassment Complaint

In early November of 1993, Katherine J. Hagedorn, who had been a graduate student in the Music Department at Brown in 1990-91, see Plaintiff's Ex. G (Mem. from Hagedorn to Romer of 9/29/91) at 2, wrote to Dean Karen Romer[12] and requested that a

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> [*A*]*ll* ... our faculty members
>
> 1.develop new courses,
> 2.prepare syllabi and lectures,
> 3.conduct seminars,
> 4.grade papers and exams,
> 5.advise students,
> 6.carry on their own research.
>
> [M]any of its professors
>
> 7.serve...as advisors, managers and long term planners on various faculty committees ....
>
> ....
>
> Undergraduate teaching will count highly in our evaluation of their performance, as will the quality of their scholarship and student advising.

Brown's Ex. 14 at 8-9 (third alteration in original)(internal quotation marks omitted).

[12] The full title of Dean Romer's position at Brown is not stated in the filings or the exhibits.

complaint of sexual harassment, which Hagedorn had originally filed in September of 1991 against Kingsbury, be reactivated, see Plaintiff's Ex. F (Letter from Hagedorn to Romer of 11/6/93) at 1; see also Plaintiff's Ex. G. Hagedorn had "stopped," Plaintiff's Ex. F at 1, the complaint process after she learned that Kingsbury was to undergo surgery for removal of the brain tumor, see id. In November of 1992, Hagedorn notified Dean Romer that she did not wish to file any formal charges against Kingsbury "at this time." Plaintiff's Ex. G at 9 (Mem. from Hagedorn to Romer of 11/30/92).

Although The Brown University Faculty Rules and Regulations ("Brown Faculty Rules and Regulations") require that a faculty member accused of sexual harassment "shall receive a written copy of the complaint and the name of the person filing the complaint," Plaintiff's Ex. FF[13] (Excerpt from Brown University Faculty Rules and Regulations) at 4, Kingsbury did not learn of Hagedorn's complaint until April of 1993 when he was told orally of its existence by Professor Baker, see Plaintiff's Ex. F at 1; Plaintiff's SUF Chronology at 1.

Hagedorn, in requesting reactivation of her complaint in November of 1993, indicated that she had heard that Kingsbury believed Brown's August 1993 decision not to allow him to return to active service must be due to her sexual harassment complaint and that he had begun talking about taking legal

[13] The court has designated two filings submitted by Plaintiff (at the court's request) after the March 11, 2003, hearing as Plaintiff's Ex. EE and FF. Plaintiff's Ex. EE is Kingsbury's letter to the court of March 18, 2003. Plaintiff's Ex. FF is an excerpt from the Brown University Faculty Rules and Regulations ("Brown Faculty Rules and Regulations").

action against Brown. See Plaintiff's Ex. F at 2. She related that as a result of Kingsbury's comments two members of the Music Department had telephoned her several times and urged her "to either file the complaint or withdraw it ...." Id. One or both of these individuals also told her that Kingsbury was spreading a rumor that she was a CIA informant. See id. Thereafter, Hagedorn recounted, she had been "kept mercilessly informed of every detail of Professor Kingsbury's behavior, including the fact that he had told several other faculty members and graduate students of the Music Department (previously innocent of any connection between Professor Kingsbury and myself) of the 'falseness' of my charges against him." Id. This alleged dissemination of the existence of her complaint by Kingsbury "infuriate[d]," id., Hagedorn, and she interpreted his allegations that she was a liar and a CIA informant as vengeance for filing the complaint against him, see id. Summarizing her reasons for the requested reactivation, Hagedorn noted that Kingsbury had attained "apparent health," id., and had slandered her by publicly characterizing her as a "liar," id., and stating that she was "a 'CIA informant,'" id. There is no evidence that Brown took any immediate action regarding Hagedorn's request.

The Prior Charge

On or about March 28, 1994,[14] Kingsbury filed a charge of

[14] Plaintiff's Ex. R (Letter from Goulet to Gregorian of 4/4/94) states that Kingsbury filed his complaint with the State of Rhode Island Commission for Human Rights ("RICHR") on March 28, 1994, as does the Complaint ¶ 32. However, Plaintiff's SUF at 8 ¶ 28, states that Kingsbury's former attorney filed the charge on March 24, 1994. (Note: Plaintiff's SUF has two paragraphs numbered "28". The court's citation here is to ¶ 28 on p. 8 of Plaintiff's SUF). Similarly, Plaintiff's SUF Chronology fixes that date as being March 24, 1994. The court uses March 28, 1994, above but recognizes that it could be

discrimination against Brown with the State of Rhode Island Commission for Human Rights ("RICHR"), charging that Brown had failed to grant him a reasonable accommodation and that Brown had discriminated against him on the basis of his physical disability.[15] See Complaint ¶ 32; Plaintiff's Ex. R (Letter from Goulet to Gregorian of 4/4/94).

The Sexual Harassment Investigation

Nine days later, on April 6, 1994, Brown University Provost Frank G. Rothman ("Provost Rothman") wrote to Hagedorn and advised her that Brown was proceeding with the investigation of her complaint. See Plaintiff's Ex. S (Letter from Rothman to Hagedorn of 4/6/94). In the letter, Provost Rothman stated:

> Since Professor Kingsbury did not assume active teaching duties in September of 1991 and has been on medical leave since that time, including the first semester of the 1993-94 academic year, the semester you reinstated your complaint, your complaint was not actively investigated. Since is it is apparent that Professor Kingsbury is seeking to return to active duty at Brown University, I believe it is appropriate to proceed with the investigation of your complaint. **As other matters with regard to Professor Kingsbury are also pending**, it may be necessary to move this matter through different channels.

Plaintiff's Ex. S (bold added).

Although the Brown Faculty Rules and Regulations provide that the Provost "shall attempt to resolve [a charge of sexual harassment against a faculty member] as promptly as possible," Plaintiff's Ex. FF at 4, and also that the faculty member

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March 24, 1994. See n.29.

[15] This charge was the basis for the complaint filed in Kingsbury I. See n.6.

shall be "informed in writing of the allegation ... [and] shall receive a written copy of the complaint," id., Kingsbury did not receive written notification of Hagedorn's accusation until May 25, 1994, when he received a letter from Associate Dean Newell M. Stultz, see Complaint ¶ 16; Plaintiff's SUF Chronology at 2 (entry for 5/27/94); Plaintiff's Ex. L at 1 (Letter from Stultz to Kingsbury of 5/25/94). In that letter Dean Stultz stated that the Provost had asked him to conduct an investigation of Hagedorn's 1991 complaint of sexual harassment which had been "reactivated by Ms. Hagedorn on November 6, 1993."[16] Id. From the face of the letter, there is no evidence that Dean Stultz enclosed or otherwise provided Kingsbury with a copy of Ms. Hagedorn's complaint. See id.

In concluding the letter, Dean Stultz assured Kingsbury that his investigation would "be independent of, and unaffected by, any other proceeding between you and the University that may be occurring." Id. Besides the pending charge before the RICHR, Kingsbury and Brown were also participating in mediation sessions conducted by the Governor's Commission on Disabilities. See Plaintiff's Ex. I; see also Complaint ¶ 34. Those mediation sessions were held on May 5, May 16, June 16, and August 1, 1994. See Plaintiff's Ex. I.

The Reprimand

On July 29, 1994, Provost Rothman sent Kingsbury a letter "strongly" reprimanding him for sexual harassment based on Kingsbury's intermittent pursuit of "a romantic relationship

[16] Kingsbury alleges in the Complaint that Brown commenced the investigation on May 17, 1994. See Complaint ¶ 36.

with Ms. Hagedorn ...."[17] Brown's Ex. 8 (Letter from Rothman to Kingsbury of 7/29/94) at 2. As for Hagedorn's complaint that Kingsbury had wrongfully linked her to the CIA, the Provost stated that he accepted the conclusion of Dean Stultz "that concrete evidence of improper behavior is lacking with respect to the allegations of a CIA connection," id. at 3 he "remain[ed] troubled by this episode," id. The Provost also informed Kingsbury that a copy of the letter would be placed permanently in the files of the Dean of the Faculty. See id.

The Reinstatement

On August 26, 1994, Dean Shepp notified Kingsbury that Brown was prepared to reinstate him as an assistant professor of Music for a three year term effective from September 1, 1994, through June 30, 1997. See Plaintiff's Ex. K (Letter from Shepp to Kingsbury of 8/26/94) at 1. Dean Shepp advised Kingsbury that:

Your reinstatement assumes that you will perform the

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[17] As quoted by the Provost, Dean Stultz's report stated in part that:

> Kingsbury engaged in verbal conduct (including some written communications) of a romantic nature regarding Ms. Hagedorn, some of it (especially his letter of April 19) coming after Ms. Hagedorn had made apparent her disinterest in having a romance with him, and that this conduct, though lasting most evidently only two days (April 18-19, 1991), in its effect created a hostile work environment for her .... In fairness to Professor Kingsbury, it is necessary to note here what he did not do. He did not apparently touch Ms. Hagedorn at any time (with the possible exception of a brief hand-holding in November, 1990) nor did he make an explicit request for sexual favors from her as a condition for her academic success.

Brown's Ex. 8 at 2 (internal quotation marks omitted).

> duties of a regular faculty member in the Department of Music. You should develop an independent program of scholarship and research, and you should consult the Criteria and Standards of the Department of Music to determine the basis on which your work will be judged. You will be expected to teach two courses each semester to be assigned by James Baker, Chair of the Music Department. Other departmental duties and responsibilities should also be discussed with the Chair.

Plaintiff's Ex. K at 1. Kingsbury resumed his duties as an assistant professor of Music in September of 1994.

The '95 Review

One year later, the senior faculty of the Department of Music conducted a review of Kingsbury's performance in the areas of scholarship, teaching, and service. See Brown's Ex. 2 (Mem. from Baker to Kingsbury of 9/29/95) at 2. Their opinions are documented in an "Annual Review" dated September 29, 1995 (the "'95 Review"), written by Professor Baker. See id. In terms of scholarship, the '95 Review stated that Kingsbury had "produced a substantial amount of scholarly work," id. at 2, since taking medical leave in 1991, see id., but because much of this work originated prior to the time period encompassed by the '95 Review, the Department thought that it was not feasible to assess his level of scholarly productivity during the past year while he was holding a full-time professorial appointment, id. Accordingly, the Department elected to "defer a detailed review of the substance of [his] work," id., noting that this was the customary practice for first-year annual reviews, see id.

As for Kingsbury's performance in the classroom, the '95 review noted that he had received mixed evaluations from students with both positive and negative comments. See id. at

2-3. His syllabi were deemed by the senior faculty to provide insufficient information, and copies of syllabi from other courses offered at Brown were attached to the '95 Review as models for Kingsbury to follow. See id. at 3. Because his syllabi and student evaluations indicated that he may not have fully covered the subject matter or fulfilled the purposes of the courses as set forth in the course descriptions, the '95 Review stressed that he teach the subject matter as prescribed by those descriptions. See id. at 3. Concern was also expressed about the low enrollment which he had experienced in Music 5, a course which "should have had a normal enrollment in the range of thirty to eighty students." See id.

Regarding Kingsbury's service, the senior faculty registered very serious concern in the '95 Review about his failure to develop "effective working relationships with faculty and staff either within or outside the Department." Id. at 4. They perceived the emergence of a pattern in his communications with faculty, staff, and administration in which instead of consulting with people who could answer a question or otherwise resolve a concern, he had "fired off memos, often sarcastic, angry, and accusatory in tone, registering a complaint." Id. The '95 Review concluded that "[b]efore we can give a positive evaluation of your teaching and service, we would have to see substantial improvement over the level of your performance in these areas last year." Id.

Kingsbury found the opinions expressed in the '95 Review "very sobering," Brown's Ex. 3 at 1, and responded to it on October 9, 1995, in a memorandum addressed to Professor Baker, see id. While "disagree[ing] with the particulars of some of the criticisms ...," id., Kingsbury stated that he took to heart what he perceived to be its main thrust, "namely your

desire that I improve my overall performance as a member of this department."

Id. He also expressed the hope that:

> my performance and behavior as a member of this department be understood in part with reference to the constant changes in my physical capabilities, many of which figure prominently in my self-image and the ease with which I conduct my affairs. Prominent among these are the changes -- noticeable to some on a weekly basis -- in my gait, my balance, and above all my speaking voice.

Id.

The Non-Renewal

I. The Music Department's Recommendation

In late September and early October of 1996, the five tenured members of the Music Department, Professors Shapiro, Baker, Josephson, Subotnik, and Titon, conducted a simultaneous annual and reappointment review of Kingsbury. See Brown's Ex. 4 (Mem. from Shapiro to Kingsbury of 10/3/96) at 1. On October 3, 1996, they voted unanimously against a renewal of his contract. See id. Professor Shapiro, who was then the departmental chairman, notified Kingsbury of this decision in a memorandum.

Excerpts from Shapiro's memorandum appear below:

> Overall, your performance has been well below what we expect of an assistant professor in the areas of scholarship, teaching, and service that we evaluate ....
>
> In sum, we believe that neither the quality of your scholarship nor the quantity of your publications during the term of this appointment is sufficient to place you in or near the first rank of scholars nationwide at the Assistant Professor level ....
>
> [Y]ou have consulted minimally, only by email, and

> only to the extent of reiterating your view of how the course should be taught .... [T]he syllabi you handed us for your courses this semester fall far short of the standard set by the best examples of syllabi in our department and in similar courses in other departments. Student response to your courses during the 1995-96 academic year is more positive than in the preceding year but still below what we would expect from faculty in your position. Enrollment in your classes remains at the low end–sometimes significantly below--what we have come to expect when other faculty teach the same courses ....
>
> Professor Baker reduced the load of departmental and university service expected of you and I have done the same since taking over the chair this summer. It is clear that this is in part due to the poor results you achieved in other service projects that you undertook in the past two years .... Overall in the area of service, as with the two others discussed above, you have not satisfied our usual criteria for reappointment.

Brown's Ex. 4 at 1-3.

Kingsbury responded to Shapiro's memorandum on October 15, 1996. See Brown's Ex. 5 (Mem. from Kingsbury to Shapiro of 10/15/96). He quoted from positive teaching evaluations by his students and noted that:

> In my Music and Language class, a majority of the students ranked me in the top two (of a five-point scale) categories in all but one of the twenty-six questions. In my other class (The Concerto), a majority of the students ranked me in the top two rankings for every question ....

Id. at 1.

Addressing the claim that the quality and quantity of his scholarly work was insufficient to place him in the front ranks of scholars nationwide of his academic rank, Kingsbury

stated that since his brain surgery in October of 1991 he had "presented invited lectures at Clark, Dartmouth, McGill, Rutgers, Sarah Lawrence, Penn, and Wesleyan (I would invite comparisons with other faculty)." Id. at 2. In addition, Kingsbury also offered
that:

> On or about September 26, 1995, Rose Subotnik ... [told me] that I had been unwise in publishing my piece, "Should Ethnomusicology be Abolished? (Reprise)," as it was, she said, an "attack" against Jeff Titon, and he is a very powerful figure ....
>
> [I]t seems hard to escape the suspicion that your recommendation of non-renewal is linked to the fact that the methodological and theoretical critique which, as you point out, "had a significant impact on the field when it was published,"[18] are [sic] now implicating the senior ethnomusicologist in this department. Thus, in addition to the serious matter of discrimination on the basis of physical disability, we are confronted here with the prospect of a striking violation of academic freedom.
>
> With regard to having more scholarly things in print ... as I told the Tenured Faculty on September 17, there are bizarre circumstances concerning my several journal submission[s], and I find it peculiar that the tenured faculty could have heard of these bizarre circumstances and yet made no comment whatever –- either to doubt their veracity or to make note of the extraordinary circumstances -- in its report/ recommendation. The circumstances are these: over the past year, the editors of three well-established scholarly journals ... have received but refused to consider my submissions. I have no knowledge whatever of why this might be so .... To the best of my knowledge, such circumstances are without precedent in

[18] The quoted language is from Professor Gerald M. Shapiro's October 3, 1996, memorandum informing Kingsbury of the Music Department's recommendation that his contract not be renewed. See Brown's Ex. 4 at 2.

> the annals of American academia. I am disappointed the Tenured Faculty saw fit to, in effect[,] ignore altogether this extraordinary story.

Brown's Ex. 5 at 1-3.

Kingsbury also noted that in 1994 Assistant Professor Carol Babiracki had been given a two year reappointment to the Music Department even though she had "NEVER published a piece of scholarly writing in a refereed journal." Id. at 3. In responding to the Department's critical comments regarding his unpublished manuscript, Ways of Hearing, Kingsbury quoted the highly enthusiastic comments he had received from Professor Jane Cowan of Sussex University, United Kingdom. See id. He also disputed that the favorable evaluations of his scholarship as reflected in letters from faculty at other institutions were, as described in Shapiro's October 3, 1996, memorandum, "largely in response to [his 1988] book, 'Music, Talent, and Performance' ...." Brown's Ex. 4 at 2. To the contrary, Kingsbury stated that these letters had been solicited by him because the writers had seen and heard him lecture in public since his hospitalization and it was for that precise reason that he sought their support. See Brown's Ex. 5 at 4. He concluded by asserting his belief that "the negative recommendation by the Tenured Faculty is not warranted by the facts, and is indefensibly biased against both my physical disabilities and my scholarly orientation." Id. at 5.

II. The Rejection by ConFRaT

On October 23, 1996, Brown's Committee on Faculty Reappointment and Tenure ("ConFRaT") met to consider the recommendation of the Department of Music that Kingsbury not be reappointed and that his contract be allowed to expire on its ending date of June 30, 1997. See Brown's Ex. 6 (Minutes

of ConFRaT Meeting of 10/23/96). Professor Shapiro presented the Department's case to the ConFRaT. See id. at 2. In response to a question as to whether Kingsbury was a distinguished scholar when he was hired in 1991, Shapiro replied that "Kingsbury had published a brilliant book ...," id., two years earlier, but when he was hired he had no position and had almost been rescued off the street by the Department, see id. Responding to another question as to whether Kingsbury had been warned about what was expected of him at the time the was hired, Shapiro answered that Kingsbury knew what was expected of him, but he was not warned. See id. Shapiro then noted that after Kingsbury's "accident there were many changes in the way he did his job." Id.

The minutes of the ConFRaT meeting indicate that the Committee members asked further questions regarding Kingsbury's scholarship. According to the minutes, after Dean Kathryn T. Spoehr, the Chairperson of the ConFRaT, asked whether Kingsbury's Ethnomusicology paper and two other papers had been accepted for publication:

> Professor Shapiro replied that although Kingsbury has had one book that was really super and continues to attract readers, the issue is why no one currently will publish his work. **The reason for this, he believes, is that Kingsbury's work is *not* publishable**--that it looks like that of a composer, not a scholar--it has no argument and it lacks rigor. Professor Rosenblum commented that Professor Shapiro was describing a dramatic shift from someone who could do scholarship, but cannot any longer. He was in agreement with her statement.

Brown's Ex. 6 at 3 (bold added) Somewhat later in the meeting, Shapiro was again asked which of Kingsbury's "current work" had been published. Id. at 4. "Professor Shapiro

responded that the Ethnomusicology piece was published, adding that is all Kingsbury has done--publish one piece," id., and that it was "not up to Department standards, [although] Kingsbury did get it into the best journal, which was great," id.

Shapiro was asked "to address Kingsbury's 'conspiracy' theory." Brown's Ex. 6 at 3. He responded that:

> this has been so embarrassing to him because Kingsbury has totally unsubstantiated ideas and implies that it is the Department's efforts which keep him from being published; he emphasized that no one is responding to Kingsbury's manuscripts.

Id. Dean Spoehr asked Shapiro if this was because the manuscripts were not ready. The minutes reflect that Shapiro replied:

> that it was because of the nature of the manuscripts .... [Shapiro] said that Kingsbury was implying that the Department was preventing his articles from being published by telling editors of various journals not to respond.

Id.

Professor Zierler, a member of the ConFRaT, observed that Shapiro had repeatedly used the word "embarrassed" in reference to Kingsbury and asked him not to speak so hyperbolically. See id. Shapiro replied that he would accommodate her request, and
in an apparent further response to her comments:

> He related that after Kingsbury's catastrophic accident, he was the one who encouraged him to return to work even though other department members did not want him back .... He emphasized that through it all he did whatever he could to help Kingsbury adjust, adding that although he may have overstated himself to ConFRaT out of nervousness he has not overstated the

> facts. He said that Kingsbury's surgery has changed him physically, intellectually, and emotionally.

Id.

Shapiro told the ConFRaT that Kingsbury's teaching did not "even come close to meeting Department standards." Id. at 4. When asked if the teaching evaluations were based on the fact that Kingsbury had low enrollments in his courses, Shapiro "replied affirmatively, explaining that MU5 usually had 60 to 80 students, but that Kingsbury teaches 5." Brown's Ex. 6 at 4. The minutes then reflect the following:

> Professor Freiberger noted that [Kingsbury] had 25 students during the Spring semester of '96. Professor Shapiro replied that it was getting better, from 5 to 25, but not nearly strong enough, adding that he would call Kingsbury's teaching acceptable for last semester only, but said one out of four semesters is not quite good enough. Dean Marsh, noting that recovery from an injury such as Kingsbury's takes quite a long time, observed that he seems to be improving in many aspects of his performance. Professor Shapiro replied that if Kingsbury was starting now, what is being reviewed would be quite different. Dean Marsh noted that it takes a long while after such surgery to judge full recovery. Dean Spoehr replied that it has been four years since his surgery. Professor Shapiro said that it was only last semester that he really worked on his scholarship, received good responses, and taught classes that were fair to students, but he had done very little service work.

Id.

After Shapiro was excused, the ConFRaT heard from Kingsbury. See id. Kingsbury stated that he wished to take exception, without seeming to be resentful, to the Department's statement that they had offered him support and encouragement. See id. at 4-5.

> He explained that since [returning] to active status,

> he ha[d] never heard a comment of encouragement or admiration from anyone on the Brown faculty, and said that while he was on medical leave he received a memo which stated, in effect, that he was a lost cause. He also related that he was the recipient of inter-office e-mail which was printed out and left in his mailbox. He said this mail contained very lurid and graphic comments about his physical disabilities.

Brown's Ex. 6 at 5.

Defending his academic performance, Kingsbury noted that "this past Spring ... the student evaluations were euphoric, if not ecstatic." Id. He stated that he had never received a majority of negative evaluations, yet the Department wrote that he was an inadequate teacher. See id.

In the course of responding to a request to comment on his manuscript Ways of Hearing, Kingsbury related that he had submitted it in rough form to Wesleyan Press, but had received a negative response which characterized the book as an attack against another ethnomusicologist. See id. He also stated that he had submitted it to a goodly number of presses, but that they would not read it and that this left him troubled and feeling that something was amiss. See Brown's Ex. 6 at 5. He noted that Professor Jane Cowan, a professional scholar, had commented favorably on the manuscript. See id.

After Kingsbury was excused, the ConFRaT considered whether to accept the Department's recommendation. Without attempting to set forth all that the minutes reflect concerning that discussion, the following excerpts shed light on the ConFRaT's five to four vote against accepting the Music Department's
recommendation.

> Professor Freiberger said it was his own personal feeling that Kingsbury should be given a chance over

> the next couple of year[s] to see what he can do, that ConFRaT cannot ignore his disability. Dean Spoehr asked what ConFRaT would do if Kingsbury did not have a disability. Dean Marsh noted that this was a reappointment, not an up or out situation. Professor Ying said that everything must be taken into consideration--that a reappointment is based mainly on the evaluation of the potential. Dean Marsh said that ConFRaT had no knowledge of what kind of recovery Kingsbury could make in the next few years .... Professor Denniston said she was troubled by what was going on with the other members of the Department--that there was a lot of personal animosity, which made her very uneasy.
>
> Dean Sacks said there were several things that occurred to him while Kingsbury was speaking: his neurological relearning, that Professor Shapiro noted Kingsbury was getting better .... [Dean Sacks] said the Department's presentation seemed odd: that they said that they were trying to help Kingsbury while secretly sending e-mails about getting him out .... Dean Marsh noted that with a neurological injury such as Kingsbury's, personality change was not uncommon--that there is much relearning that goes on and some change in personality is likely .... Dean Sacks observed that Kingsbury's scores were not terribly high but that a number of student evaluators said that he was brilliant .... Dean Estrup said he was worried because even if ConFRaT found a way to keep [Kingsbury] for a few years, Kingsbury did not have a chance in the Music Department. Professor Zierler ... added that if ConFRaT supported the recommendation, this would be a case where the person is misled to believe they are terrible, when that is not what ConFRaT thinks .... Professor Ying said he believed that at this point Kingsbury has the potential, and that the two-year reappointment would send the message that ConFRaT is not completely satisfied. Dean Estrup replied that in supporting Kingsbury, ConFRaT is sending the message that the Department, who are the experts, are not judging by their usual standards ....

Brown's Ex. 6 at 6-7.

III. The Provost's Decision

On November 21, 1996, Provost James E. Pomerantz notified Dean Spoehr that he had decided that Kingsbury's contract would not be renewed when it expired on June 30, 1997. See Brown's Ex. 7 (Mem. from Pomerantz to Spoehr of 11/21/96). Provost Pomerantz stated that he based his decision "primarily on the merits of the dossier that ConFRaT considered."[19] Id. at 1. He indicated that he had also "given secondary consideration to independent information ...," id., which he had ascertained bore on matters that the ConFRaT considered and to earlier matters involving Professor Kingsbury's employment at Brown of which the ConFRaT was not aware, see id.

As expressed by the Provost, the reasons for his decision, were: 1) that "the quantity and quality of [Kingsbury's] scholarly work falls short of the standard we expect at Brown," id.; 2) that "the evaluation of his teaching, including the number of students taking his courses, is less favorable than our standards demand," id.; 3) "that through the written materials Professor Kingsbury submitted to ConFRaT and through his comments before them last month, Professor Kingsbury conveyed the strong impression that his Music Departmental faculty colleagues have interfered with his

[19] Although Brown argues in its memorandum that the University Provost "did not consider Kingsbury's service ...," Memorandum of Law in Support of Motion for Summary Judgment ("Brown's Mem.") at 5 (citing Brown's Ex. 7 (Mem. from Pomerantz to Spoehr of 11/21/96)), when he determined that Kingsbury's contract should not be renewed, the court finds no support for that statement in Brown's Ex. 7. To the contrary, it seems highly likely that the dossier included the notice to Kingsbury that the Music Department was recommending that his contract not be renewed, see Brown's Ex. 4 (Mem. from Shapiro to Kingsbury of 10/3/96). The penultimate paragraph of that notice concluded by stating: "Overall in the area of service ... you have not satisfied our usual criteria for reappointment." Id. at 3.

efforts to publish his scholarly work," Brown's Ex. 7, that "Professor Kingsbury conveyed this allegation directly to at least one student in his Department," id., that "[a]n investigation conducted by my office has revealed that the journal editors to whom Professor Kingsbury submitted manuscripts report no contact or other form of interference by Professor Kingsbury's Brown colleagues in the publication process," id. at 1-2, and that as a result of this investigation the Provost had concluded "first, that [Kingsbury's] difficulty in getting his current manuscripts published is a reflection on the quality of those manuscripts, and second that Professor Kingsbury would allege so serious a charge against faculty members in his Department makes me question his judgment and his collegiality," id. at 2; and 4) that Kingsbury had been reprimanded on July 29, 1994, for an incident of sexual harassment in 1991, see id.

Near the end of the memorandum, Provost Pomerantz, while noting that "the matters of Professor Kingsbury's publications and the 1991 incident [were] not insignificant," Brown's Ex. 7 at 2, repeated that "the primary basis," id., of his determination was Kingsbury's scholarly performance. From the context of the memorandum, one may reasonably conclude that "the matter[] of Professor Kingsbury's publications," id., refers to the allegation that Kingsbury's colleagues interfered with the publication of his works and does not refer to the "quantity and quality," id. at 1, of his publications. The latter considerations are clearly included in the "scholarly work," id., which the Provost found wanting and which he cited as the first reason for his decision not to renew Kingsbury's contract, see id.

The Present Charge

On May 28, 1997, Kingsbury filed a second charge of discrimination against Brown with the RICHR and the Equal Employment Opportunity Commission ("EEOC"). See Brown's SUF ¶ 33; Response to Brown's SUF ¶ 33; Complaint ¶ 2. He alleged that Brown's refusal to renew his contract was illegal discrimination based on his disability and retaliation for filing a prior charge of discrimination. See Complaint ¶¶ 2, 47, 50, 60; Brown's SUF ¶ 33; Response to Brown's SUF ¶ 33. A Notice of Right to Sue (the "Notice") was issued by the EEOC on December 7, 2001. See Complaint ¶ 2; Brown's SUF ¶ 33; Response to Brown's SUF ¶ 33.

Travel

Kingsbury filed the Complaint in the present action on February 4, 2002, which was within ninety days of his receipt of the Notice. Thus, the action was timely filed. See 42 U.S.C. § 2000e-5. Brown filed Defendant's Motion for Summary Judgment (the "Motion") on January 31, 2003. The court conducted a hearing on the Motion on March 11, 2003. Following that hearing, the court requested that the parties provide certain additional information relative to the exhibits which had been filed. See Letter from Martin, M.J., to Little and Kingsbury of 3/14/03. After receiving the responses from Kingsbury on March 20, 2003, and from Brown's counsel on March 24, 2003, the court took the matter under advisement.

Summary Judgment Standard

When determining a motion for summary judgment, a court must review the evidence in the light most favorable to the nonmoving party and must draw all reasonable inferences in the nonmoving party's favor. See Mesnick v. Gen. Elec. Co., 950 F.2d 816, 822 (1st Cir. 1991); Griggs-Ryan v. Smith, 904 F.2d

112, 115 (1st Cir. 1990).

> Summary judgment is appropriate only if "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). "A dispute is genuine if the evidence about the fact is such that a reasonable jury could resolve the point in the favor of the non-moving party. A fact is material if it carries with it the potential to affect the outcome of the suit under the applicable law." Sanchez v. Alvarado, 101 F.3d 223, 227 (1st Cir.1996) (internal quotations and citations omitted).
>
> The moving party "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). "Once the moving party has properly supported [its] motion for summary judgment, the burden shifts to the nonmoving party, with respect to each issue on which [it] has the burden of proof, to demonstrate that a trier of fact reasonably could find in [its] favor." DeNovellis v. Shalala, 124 F.3d 298, 306 (1st Cir.1997), citing Celotex, 477 U.S. at 322-25, 106 S.Ct. 2548. In opposing summary judgment, the nonmoving party "may not rest upon the mere allegations or denials of [the] pleading, but must set forth specific facts showing that there is a genuine issue" of material fact as to each issue upon which he or she would bear the ultimate burden of proof at trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (internal quotations, citation, and alteration omitted).

Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 52-53 (1st Cir. 2000)(alterations in original).

Discussion

The Discrimination Claim: Count 1

Kingsbury's discrimination claimed is based on Brown's

failure to renew his three year teaching contract. See Complaint ¶¶ 47, 49-50. He alleges that Brown unlawfully discriminated against him on the basis of his disabilities. See id. ¶ 47.

I. Applicable Law

> To make out a disability discrimination claim under the ADA, a plaintiff must prove by a preponderance of the evidence (1) that [he] was disabled within the meaning of the ADA; (2) that, with or without reasonable accommodation, [he] was able to perform the essential functions of [his] job (in other words, that [he] was "qualified"); and (3) that the employer discharged [him] in whole or in part because of [his] disability.

Champagne v. Servistar Corp., 138 F.3d 7, 12 n.4 (1st Cir. 1998) (citing Equal Employment Opportunity Comm'n v. Amego, Inc., 110 F.3d 135, 141 n.2 (1st Cir. 1997)).

The court views Kingsbury's claim that Brown wrongfully failed to renew his contract as equivalent to an unlawful termination claim.[20] Hence, it is governed by the burden-shifting analysis set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).[21]

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[20] Brown agrees that Kingsbury's discrimination claim should be treated as "[a] claim of discriminatory termination." Brown's Mem. at 6.

[21] Arguably, the burden shifting paradigm of McDonnell Douglas should not be applied to this case because the "essential functions" of Kingsbury's position, which Brown contends he was unable to adequately perform, see Brown's Mem. at 8 n.3, were formulated only after his attorney had sent Brown a demand letter, and there is some evidence that at least one individual directly involved in defining those "essential functions," Professor Josephson, harbored discriminatory animus towards Kingsbury, see Plaintiff's Ex. O, X. Given the close relationship among the senior faculty members of the Department, Josephson's animus may have infected Baker and Shapiro, see Plaintiff's Ex. X; Brown's Ex. 14 at 1-2; see also discussion at

See Marcano-Rivera v. Pueblo Int'l, Inc., 232 F.3d 245, 251 (1st Cir. 2000).

The basic McDonnell Douglas analysis is well known:

> [A] plaintiff who suffers from a disability makes out a prima facie case of employment discrimination by demonstrating that [he] is a member of a protected group who has been denied an employment opportunity for which [he] was otherwise qualified. Such a showing gives rise to an inference that the employer discriminated due to the plaintiff's disability and places upon the employer the burden of articulating a legitimate, non- discriminatory reason for the adverse employment decision. This entails only a burden of

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41-42 regarding the adverse inference which can be drawn from Shapiro's statements to ConFRaT. The McDonnell Douglas framework is generally used when there is no direct evidence of discriminatory animus. See Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 263 (1st Cir. 1999); Laurin v. Providence Hosp., 150 F.3d 52, 58 (1st Cir. 1998) ("Absent ***direct*** evidence that the Hospital harbored a discriminatory animus in maintaining that shift-rotation was an 'essential [job] function,' Laurin had no option but to resort to the familiar McDonnell-Douglas burden-shifting paradigm to establish a circumstantial case.")(alteration in original); Hodgens v. Gen. Dynamics Corp., 144 F.3d 151, 160 (1st Cir. 1998)("We ... hold that, when there is no direct evidence of discrimination, the McDonnell Douglas burden-shifting framework applies to claims that an employee was discriminated against for availing himself of FMLA-protected rights."); Cruz v. McAllister Bros., Inc., 52 F.Supp.2d 269, 279 n.58 (D.P.R. 1999) (noting that in Laurin the court used the McDonnell Douglas "burden-shifting framework because it had to determine whether the employer had a discriminatory animus when it defined the essential functions of plaintiff's position and because there was no direct evidence of this animus."); cf. Laurin, 150 F.3d at 58 (noting, in contrast to Kingsbury's circumstances, that "[plaintiff] failed to adduce competent evidence that her immediate supervisors played a meaningful role in the subsequent Hospital decision to deny the requested accommodation and discharge her.").

Brown asserts that the McDonnell Douglas framework applies, see Brown's Mem. at 6, and Kingsbury appears to concur, see Plaintiff's Memorandum of Law ("Plaintiff's Mem.) at 1. While the issue is not free from doubt, given the limited amount of direct evidence of discriminatory animus, the court concludes that utilization of the McDonnell Douglas framework is the better course here.

> production, not a burden of persuasion; the task of proving discrimination remains the plaintiff's at all times. Once such a reason emerges, the inference raised by the prima facie case dissolves and the plaintiff is required to show ... that the employer's proffered reason is a pretext for discrimination.

Id. (quoting Dichner v. Liberty Travel, 141 F.3d 24, 29-30 (1st Cir. 1998))(citations and footnote omitted). The Supreme Court reaffirmed this analytical framework in Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 142, 120 S.Ct. 2097, 2106, 147 L.Ed.2d 105 (2000). In Reeves, the Court clarified that once a plaintiff has established a prima facie case and the employer has put forward a nondiscriminatory justification:

> although the presumption of discrimination "drops out of the picture" once the defendant meets its burden of production, the trier of fact may still consider the evidence establishing plaintiff's prima facie case "and inferences properly drawn therefrom ... on the issue of whether the defendant's explanation is pretextual."

Marcano-Rivera v. Pueblo Int'l, Inc., 232 F.3d at 251 (1st Cir. 2000)(quoting Reeves, 530 U.S. at 143, 120 S.Ct. at 2106). The holding in Reeves allows an employee to establish the discriminatory motives of his employer by making "a substantial showing that [his employer's] explanation was false." Reeves, 530 U.S. at 144, 120 S.Ct. at 2107. The Court explained: "[I]t is ***permissible*** for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." Id. at 147, 120 S.Ct. at 2108; accord Fite v. Digital Equip. Corp., 232 F.3d 3, 7 (1st Cir.

2000) ("'[T]he falsity of the employer's explanation' may permit the jury to infer a discriminatory motive but does not compel such a finding.")(quoting Reeves, 530 U.S. at 147, 120 S.Ct. at 2108).

II. Prima Facie Case

As a preliminary matter, the court addresses Brown's argument, raised in a footnote, that Kingsbury cannot establish the elements of a prima facie case. See Brown's Mem. at 8 n.3. Relying upon the ADA's definition of a qualified individual with a disability as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires," 42 U.S.C. § 12111(8), and the fact that Kingsbury bears the burden of showing that he can perform the essential functions of his job, see Gillen v. Fallon Ambulance Serv., Inc., 283 F.3d 11, 24 (1st Cir. 2002), Brown asserts that Kingsbury "would be unable to meet this burden because he was unable to adequately perform two of the essential functions of his position, teaching and scholarship," Brown's Mem. at 8 n.3. Brown notes Gillen's holding that "[i]n deciding whether a specific job function is essential or marginal, courts must pay heed 'to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job." Gillen, 283 F.3d at 25.

The heed which this court should pay to Brown's Ex. 1 (Essential Functions Statement) is considerably reduced by several factors. The Statement was created after Kingsbury was hired, and it goes well beyond the requirements or

principal duties of the position as expressed in two earlier Brown documents. See Plaintiff's Ex. U (Faculty Position Authorization of Oct. 1990); Plaintiff's Ex. L at 2 (Letter from Shepp to Kingsbury of 8/30/93). The Essential Functions Statement was created as a result of the demand letter from Kingsbury's attorney seeking reinstatement and reasonable accommodation. The Statement is largely the product of five individuals, see Plaintiff's Ex. O, and there is some evidence that one of those individuals (Josephson) harbored discriminatory animus towards Kingsbury. Finally, the tasks were drafted by these individuals with Kingsbury specifically in mind and, therefore, it cannot be assumed that the tasks constitute an objective statement of the requirements of the position.

In any case, even if teaching and scholarship are "essential functions" of Kingsbury's position, see Brown's Ex., Kingsbury Dep. of 11/18/02 at 51 (agreeing "that as an assistant professor it would be ex[pec]ted that [he] would produce substantial[] scholarly or creative work of the highest quality in order to obtain a position of national and international prominence in [his] field"), this court rejects Brown's contention that Kingsbury cannot show that he was able to perform those functions "with or without a reasonable accommodation ...," 42 U.S.C. § 12111(8), and also rejects Brown's contention that he cannot show a basis to doubt Brown's stated reasons for not renewing his contract. In brief, as to the former contention, the court finds the fact that Kingsbury performed the duties of an assistant professor of music from at least September of 1994 through June of 1997 to be a sufficient showing for purposes of a prima facie case. As to the latter contention, the court's reasons for rejecting

it are set forth in the body of this Report and Recommendation. In sum, the court disagrees with Brown's contention that Kingsbury would be unable to establish a prima facie case.

III. Issue

Brown posits that the issue presented by the instant Motion (relative to the discrimination claim alleged in Count 1) is "whether Kingsbury can make a substantial showing that the Provost's reasons for the decision not to renew his contract were false." Brown's Mem. at 7 (citing Williams v. Raytheon, 220 F.3d 16, 19 (1st Cir. 2000)). The court agrees. The court also agrees that Kingsbury's discrimination claim must fail as a matter of law if there is no basis provided upon which the trier of fact can infer discriminatory motives. See id. (citing Griel v. Franklin Med. Ctr., 234 F.3d 731, 733 (1st Cir. 2000)).

IV. Brown's Argument

Brown asserts that this action "mirrors" Griel, 234 F.3d 731, in that no reasonable jury could disbelieve the non-discriminatory reasons asserted by Brown for not renewing Kingsbury's contract, see Brown's Mem. at 7 (citing Griel at 732), and that Kingsbury's evidence does not provide a reasonable jury any basis to doubt that Brown's motive for that action was a genuine concern about Kingsbury's abilities, see id. at 7-8 (citing Griel at 733 and Marcano-Rivera v. Pueblo Int'l, Inc., 232 F.3d 245, 252 (1st Cir. 2000)(affirming the grant of defendant's motion for judgment as a matter of law at the close of the evidence where employer introduced evidence of legitimate reasons for termination and plaintiff failed to contradict such evidence.)). Stated differently, Brown contends that even if Kingsbury can establish a prima

facie case of discrimination, his claim fails because he can point to no potentially admissible evidence to show that the reasons offered by Brown for non-renewal of his contract were false. See Brown's Mem. at 8 (citing Cardona v. United Parcel Service, 79 F.Supp.2d 35, 40 (D.P.R. 2000)(citing Cardona Jimenez v. Bancomerico de Puerto Rico, 174 F.3d 36, 41 (1st Cir. 1999)(stating that the burden of proof is modest in discrimination case)).

V. Reasons for Non-Renewal

As detailed more fully in the Facts portion of this Report and Recommendation supra at 26-27, the Provost cited four reasons for the non-renewal of Kingsbury's contract: 1) inadequate scholarship, 2) inadequate teaching, 3) Kingsbury's strong conveyance of the false impression that his colleagues in the Music Department had interfered with the publication of his scholarly works, and 4) the sexual harassment reprimand. See Brown's Ex. 7. The court examines these reasons.

A. Inadequate Scholarship

The Provost deemed the first of these reasons, inadequate scholarship, as the "primary basis of [his] determination ...." Brown's Ex. 7 at 2. In stating that "both the quantity and quality of [Kingsbury's] scholarly work fall[] short of the standard we expect at Brown," Brown's Ex. 7, and that "[Kingsbury's] difficulty in getting his current manuscripts published is a reflection on the quality of those manuscripts ...," id. at 2, the Provost, in effect, adopted the position of the Music Department, see Brown's Ex. 4, as expressed by Professor Shapiro before the ConFRaT, see Brown's Ex. 6 at 2-4. Shapiro told the ConFRaT that "the issue is why no one currently will publish [Kingsbury's] work," id. at 3, and proclaimed his belief that "Kingsbury's work is not

publishable," id.

Yet, at the time the Provost issued his decision, he knew (or it can reasonably be inferred that he knew) the following facts. First, Kingsbury in 1988 had published a book, Music, Talent, and Peformance: A Conservatory Cultural System, (1988, Temple University Press). See Brown's Ex. 10; Affidavit of Henry Kingsbury ("Kingsbury Aff.") ¶ 1. Second, Shapiro had described the book as "brilliant," Brown's Ex. 6 at 2, and having had "a significant impact on the field when it was published ...," Brown's Ex. 4 at 2. Third, Kingsbury had published in 1991 an article, "Sociological Factors in Musicological Poetics," id.; see also Brown Ex. 6 at 4, 10 at 2, in Ethnomusicology,[22] which Shapiro described as being "the best journal," Brown's Ex. 6 at 4. Fourth, Kingsbury's article "Should Ethnomusicology Be Abolished? (Reprise)" had been accepted for publication in Ethnomusicology, see Brown's Ex. 2 at 4, and that this would be his second piece in "the best journal," Brown's Ex. 6 at 4. Fifth, during his time at Brown Kingsbury had written an entire six-chapter book manuscript entitled Ways of Hearing and had submitted it for publication, although it had not yet been accepted.[23] See

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[22] The court reaches this conclusion based upon information contained in the following exhibits: Brown's Ex. 6 at 2 (noting that Kingsbury has published "a piece" in 1991); Brown's Ex. 10 at 1 (Kingsbury's Curriculum Vitae reflecting publication of the article in 1991 in Ethnomusicology).

[23] Kingsbury's colleagues in the Music Department believed the manuscript to be "problematical on several counts," Brown's Ex. 4 at 2, and "far from being in a finished, publishable state, and desperately need[ing] a rigorous process of revision and editing," id. However, in light of all the circumstances in this case, particularly the fact that shortly after the Provost's decision two more of Kingsbury's articles were accepted for publication, see Plaintiff's SUF ¶ 9, Kingsbury's response to these negative comments

Plaintiff's SUF ¶ 10; Brown's Ex. 4 at 2; Brown's Ex. 5 at 3. Sixth, Kingsbury's review of "Heartland Excursions: Ethnomusicology Reflections on Schools of Music" by Bruno Nettl had been accepted for publication by Notes, a publication conceded by Shapiro to be "prestigious." Brown's Ex. 4 at 2. Seventh, within the previous ten days Provost Pomerantz had been informed by Dean Stultz that James Cowdery, the editor of Ethnomusicology, "knows and likes [Kingsbury's] work and has in fact agreed to publish HK's recent submission."[24] Brown's Ex. 9 (e-mail from Stultz to Pomerantz

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should not be dismissed out of hand:

> [W]hile the Ways manuscript is not veneered, it is a totality sufficiently developed for presentation, something which is of considerable significance in the context of the department's own standards and criteria for promotion and reappointment .... [M]y Ways manuscript is far more advanced, in every respect, than was the relatively ragtag manuscript that secured the contract resulting in Music, Talent, and Performance.

Brown's Ex. 5 at 3-4. Regarding that earlier work, Kingsbury notes that:

> My book was published only after having been submitted to at least four different publishing companies, and submitted to at least seven substantial text-revisions over a period of about four years. The fact that my book went through numerous revisions before its final publication is not considered as a drawback to the book in any way; the phenomenon of multiple revisions prior to publication is very common in the publishing of scholarly books. This is common knowledge among experienced book authors.

Kingsbury Aff. ¶ 1.

[24] The "recent submission" was "Should Ethnomusicology [B]e Abolished (Reprise)," which was published in 1997 in vol. 41 #2 of Ethnomusicology. See Plaintiff's Ex. EE (Letter from Kingsbury to Martin, M.J., of 3/18/03); see also n.13. The court observes that describing as "recent" a submission apparently made two years

of 11/11/96) at 1. Eighth, Carol M. Babiracki, an assistant professor of music in the Music Department, who was initially hired as an instructor in Music in 1988 and promoted to assistant professor effective January 1, 1991, had been appointed to a three year term from July 1, 1991, to June 30, 1994, see Affidavit of James Baker ("Baker Aff.") ¶ 2, even though she had not published anything in a peer- reviewed scholarly periodical, see Plaintiff's Ex. M (Mem. from Titon to Shapiro of 11/5/96) at 2; Plaintiff's SUF ¶ 13; Kingsbury Aff. ¶ 5; Brown's Ex. 5 at 3.

The foregoing creates some doubt as to the veracity of the Provost's statements regarding Kingsbury's allegedly inadequate scholarship, especially facts seven and eight. Compare Marcano-Rivera v. Pueblo Int'l, Inc., 232 F.3d 245, 252 (1st Cir. 2000) ("[P]laintiff offers no evidence that other similarly situated employees without physical disabilities were treated differently with regard to their classification."); Randlett v. Shalala, 118 F.3d 857, 863 (1st Cir. 1997)("[T]here is no showing that in denying [plaintiff's] request, [defendant] was departing from its usual practice."). Regarding Professor Babiracki, Brown argues that there were significant differences between her and Kingsbury, see Brown's Mem. at 10-11; Baker Aff., and that the renewal of her contract cannot be taken as evidence that Brown's stated reasons for non-renewal (primary of which was

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earlier, see Brown's Ex. 2 at 2; Brown's Ex. 4 at 2, suggests (assuming the description was Mr. Cowdery's and not Dean Stultz) a concept of time which is peculiar to the world of academic journals. However, this oddity does not otherwise detract from the significance of this evidence which substantially rebuts the claim made by Professor Shapiro before the ConFRaT that Kingsbury's work was not publishable.

his "scholarly performance," Brown's Ex. 7 at 2, were false. The court disagrees.

> If a claim of disparate treatment is based on evidence comparing the plaintiff to other employees the compared individuals must be "'similarly situated in all material respects.'" Rodriguez-Cuervos v. Wal-Mart Stores, Inc., 181 F.3d 15, 21 (1st Cir.1999) (quoting Perkins v. Brigham & Women's Hosp., 78 F.3d 747, 751 (1st Cir.1996)); Cardona Jimenez [v. Bancomerico de Puerto Rico], 174 F.3d [36,] at 42 [1st Cir. 1999]. The comparison need not be an exact replica of the plaintiff's situation. Rodriguez-Cuervos, 181 F.3d at 21; Carey v. Mt. Desert Island Hosp., 156 F.3d 31, 38 (1st Cir.1998). A comparison with the plaintiff will be valid if "a prudent person, looking objectively at the incidents, would think them roughly equivalent and the protagonists similarly situated." The Dartmouth Review v. Dartmouth College, 889 F.2d 13, 19 (1st Cir.1989).

Cardona v. United Parcel Serv., 79 F.Supp.2d 35, 42-43 (D.P.R. 2000).

This court finds that a prudent person looking at Kingsbury and Babiracki would find them roughly equivalent and similarly situated, and that Kingsbury has met his burden in this regard. See Rodriguez-Cuervos v. Wal- Mart Stores, Inc., 181 F.3d at 21. Both Kingsbury and Babiracki began their employment at Brown in what appear to have been entry level positions: Kingsbury as a visiting adjunct assistant professor of Music, and Babiracki as an instructor of Music. Kingsbury was appointed to a regular assistant professorship within a year of his arrival and given a three year term. Babiracki was promoted to assistant professor of Music after two years and given a three year term. See Baker Aff. ¶ 2. Both had periods of leave after their appointments to regular assistant

professorships. Kingsbury was on medical leave from October of 1991 to September 1994, and Babiracki was on sabbatical leave for the 1992-93 academic year. See id. ¶ 4.

Brown's Music Department during the relevant time period appears to have been relatively small. As far as can be gleaned from the present record, it apparently consisted of five senior faculty members, Professors Shapiro, Baker, Josephson, Subotnik, and Titon, see Brown's Ex. 4 at 3, and two junior faculty members, Kingsbury and Babiracki (until her resignation on June 30, 1995), see Baker Aff. ¶ 8. Although the Baker Aff. casts Babiracki in a glowing light[25] and attempts to justify the decision to award her a two year reappointment as of July 1, 1994, despite her failure to publish anything in a peer-reviewed scholarly periodical, see Plaintiff's SUF ¶ 13; Plaintiff's Ex. M at 2, the fact remains that Kingsbury, who had authored a "brilliant" book and had published articles "in the best journal" was denied reappointment "primarily" on the basis that the quantity and quality of his scholarly work did not meet Brown's standards for an assistant professor of Music. Babiracki, whose quantity and quality of published

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[25] The Baker Aff. affirmed in part that:

> The faculty's overall evaluation of Babiracki's teaching was quite positive with particular mention made of her dedication as a teacher and her success at creating upper-level courses that enhanced the curriculum. The faculty regarded Babiracki as a promising scholar in the field of ethnomusicology and believed that her paper "What's the Difference: Reflections on Gender, Interpretation and Research in Village India" opened up exciting new directions in her research.

Baker Aff. ¶ 5.

work in peer-reviewed scholarly periodicals was zero, was reappointed.

In short, the court is unpersuaded by Brown's argument "that the contrary results reached in the contract renewals of Babiracki and Kingsbury were based on the significant differences in the teaching performance and scholarly potential of the candidates." Brown's Mem. at 11. The evaluations of Babiracki and Kingsbury were made by the senior members of the Music Department faculty, and there is evidence that at least one member (Professor Josephson) harbored discriminatory animus against Kingsbury. Furthermore, the court cannot ignore the fact that Professor Baker, the author of the affidavit upon which Brown relies to explain the renewal of Babiracki's contract, is hardly unbiased or disinterested in this matter.

Lastly, the Provost's statement that the "quantity ... of the scholarly work falls short of the standard we expect at Brown," Brown's Ex. 7 at 1, is further undermined by the fact that shortly after the Provost's decision two more of Kingsbury's articles were accepted for publication. Less than a week later, on November 26, 1996, Kingsbury's article, "New Testament Anthropology and the Claim of an Ethnographer's Voice," was accepted for publication in Dialectical Anthropology and appeared therein in 1997. See Plaintiff's SUF ¶ 9. Shortly thereafter, a second article, "Situations, Representations, and Musicalities," was accepted in December of 1996 or January of 1997 and was published in Philosophy of Music Education Review. See id.; cf. Gillen v. Fallon Ambulance Serv., 283 F.3d 11, 31 (1st Cir. 2002) (noting that plaintiff's ultimate success in performing all the duties of an EMT with two other employers after defendant had rejected

her was evidence, coupled with other facts, which could support an inference that plaintiff was able to perform those duties at the time defendant rejected her). For the foregoing reasons, I find that Kingsbury has made a substantial showing that the stated reason for the non-renewal of his contract, inadequate scholarship, was false. See Williams v. Raytheon Co., 220 F.3d 16, 19 (1st Cir. 2000).

B. Inadequate Teaching

In his decision, the Provost stated that Kingsbury's teaching, "including the number of students taking his courses, is less favorable than our standards demand." Brown's Ex. 7 at 1. The basis for this conclusion appears to have been the information contained in the dossier that the ConFRaT considered. See id.

This court notes that when Professor Shapiro appeared before the ConFRaT, he informed the committee "that MU5 usually had 60 to 80 students, but that Kingsbury teaches 5." Brown's Ex. 6 at 4. Although stated in the present tense, Shapiro's statement appears to have pertained to an offering of that course which occurred prior to the spring semester of 1996. The ConFRaT minutes reflect that immediately after making the statement, Professor Freiberger, a member of ConFRaT, "noted that [Kingsbury] had 25 students during the Spring semester of '96." Brown's Ex. 6 at 4. Shapiro responded that "it was getting better, from 5 to 25, but not nearly strong enough, adding that he would call Kingsbury's teaching acceptable for last semester only, but said one out of four semesters is not quite good enough." Id.

There is evidence that Shapiro in using the number 60 significantly overstated to ConFRaT the low end of the usual enrollment range for MU5. A year earlier, Professor Baker,

who was then the Chairman of the Department, told Kingsbury in the '95 Review that "Music 5 ... [presumably MU5] should have had a normal enrollment in the range from thirty to eighty students." Brown's Ex. 2 at 3. Shapiro was aware of (and had approved) the '95 Review, see id., and, thus, it can be reasonably inferred that he was aware that normal enrollment range was 30 to 80 students when he appeared before ConFRaT. Shapiro also knew that Kingsbury had 35 students enrolled in MU5 as of September 17, 1996, see Plaintiff's Ex. C at 2, which was within the range Professor Baker had characterized as "normal" in September of 1995. The fact that Shapiro would tell the ConFRaT that MU5 "usually had 60 to 80 students, but that Kingsbury teaches 5," Brown's Ex. 6 at 4, while knowing that Kingsbury's current enrollment for that course of 35 was within the range previously described as "normal" in the '95 Review is significant for two reasons. It provides a basis for drawing an adverse regarding whether Shapiro harbored discriminatory animus against Kingsbury. It also casts some doubt, albeit limited,[26] on the Provost's statement that "the number of students taking his courses[] is less favorable than our standards demand." Brown's Ex. 7 at 1.

Kingsbury states, and Brown has not disputed, that the three letters the Music Department received from students (after the Department tabled a vote on his reappointment[27]),

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[26] Kingsbury testified at a November 18, 2002, deposition that he had no reason to disbelieve the statement that "enrollment in your classes remains at the low end, sometimes significantly below the enrollment that other faculty attracted." Brown's Ex., Kingsbury Dep. of 11/18/02 at 81-82.

[27] Thereafter, on October 3, 1996, the Music Department voted not to renew Kingsbury's contract. See Plaintiff's Ex. C (Music Department Minutes of 9/17/96, 9/18/96, and 10/3/96) at 5.

see Plaintiff's Ex. C at 5, were all favorable, see Plaintiff's SUF ¶ 11. Kingsbury has also submitted as exhibits six positive student evaluations, see Plaintiff's Ex. B (Music Department Evaluation Forms) and a two page typed letter from his teaching assistant, see id. at 7 (Letter from Alstrup of 9/23/96). By themselves these exhibits are not particularly persuasive, and they advance Kingsbury's cause only slightly.

Of somewhat greater value is the evidence reflected in the following excerpt from the ConFRaT minutes regarding Kingsbury's teaching.

> Dean Sacks observed that Kingsbury's scores were not terribly high but that a number of student evaluators said he was brilliant. He noted there was an undercurrent that the course was unstructured and said that may be because he turns on a number of students and would want to see that applauded. Dean Spoehr responded that about forty students have been driven away from the course and that the students who did review were self- selected, a fact ConFRaT cannot ignore.

Brown's Ex. 6 at 6. Although the court cannot be certain, it appears the course to which Dean Sacks is referring in the above excerpt is MU5. Dean Spoehr's rejoinder that "forty students have been driven away," seems to be based on the higher enrollment range of 60 to 80 students given to ConFRaT by Professor Shapiro. If that range is inaccurate, as Professor Baker's statement in the '95 Review strongly suggests, Dean Spoehr's point is significantly weakened.

The court also finds problematic Brown's reliance on the Essential Functions Statement as support for its argument that Kingsbury "generally failed," Brown's Mem. at 4, as a teacher

during his time at the University, see id. at 4-5. As already explained, the circumstances surrounding the creation of that document, see Facts supra at 7-9, taint it. The court declines to use it as a basis for making a determination regarding Kingsbury's performance as a teacher.

Although the court considers it to be a close question, the court concludes, taking into consideration all the circumstances which exist in this case, that Kingsbury has shown substantial evidence to doubt that his teaching was inadequate.

C. False Impression

The third reason given by the Provost for his decision was that Kingsbury had conveyed, in the written materials submitted to ConFRaT and in his comments before them, the strong impression that his colleagues in the Music Department had interfered with his efforts to publish scholarly works. See Brown's Ex. 7 at 1.

Brown asserts in its Mem. that:

> Kingsbury attributed his lack of publication to a conspiracy by members of the Music Department faculty to prevent publication of his works. [Brown's] Exhibit 7. However, an investigation by the Provost revealed no such interference. [Brown's] Exhibits 7 and 9.

Brown's Mem. at 9.

The present record is devoid of any direct evidence that Kingsbury ever made the accusation which the Provost impliedly attributes to him, and Kingsbury disputes that he did. See Brown's Ex., Kingsbury's Dep. of 11/18/02 at 88 ("I made no such representation to ConFRaT either in writing or in speech. And when I met with Mr. Pomerantz just a few days before this thing, he asked me point blank about that and I point blank

said I made no such representations."); Response to Brown's SUF ¶ 20 (disagreeing with Brown's SUF ¶ 20); see also Brown's Ex. 5 at 3 ("I [Kingsbury] have no knowledge whatever of why this [the refusal of scholarly journals to consider his submissions] might be so.")

In deciding a motion for summary judgment, a court may not make credibility determinations. See Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 150, 120 S.Ct. 2097, 2110, 147 L.Ed.2d 105 (2000); White v. New Hampshire Dep't of Corr., 221 F.3d 254, 259 (1st Cir. 2000). Kingsbury disputes that he conveyed the "strong impression" in the written materials submitted to the ConFRaT and through his comments before them (or at any time for that matter) that his colleagues were interfering with his efforts to publish his scholarly work.

Having carefully reviewed the exhibits which the parties have submitted, the court cannot agree that by any of them Kingsbury "strongly" conveyed the impression attributed to him by the Provost. The statements contained in the materials, which are directly attributable to Kingsbury, reflect that he is disturbed that his colleagues are seemingly unconcerned or uninterested in a problem which has such serious implications for him professionally. The statements in the materials, which are attributable to other persons, reflect their impressions of the situation, which in some instances partly coincide with Kingsbury's view and partly coincide with the Provost's conclusion. See, e.g., Plaintiff's Ex. M at 2 ("Henry finds it odd that the tenured faculty ignored the fact that three journals refused to consider his submissions. It is not clear to me what he expected we ought to do, but he implies we should have investigated it .... Instead, he chose

to paint a conspiracy.")

The ConFRaT minutes, in particular, do not, in the court's judgment, indicate that Kingsbury "strongly" conveyed the impression the Provost asserts. The ConFRaT minutes do not reflect that Kingsbury made any conspiracy assertions. See Brown's Ex. 6. They do indicate that "Professor Freiberger asked Professor Shapiro to address Kingsbury's 'conspiracy' theory," id. at 3, but the basis (or the source) of Freiberger's opinion that Kingsbury had a "conspiracy theory" is unclear. At bottom, the issue of whether Kingsbury directly conveyed the claimed allegation is disputed.

The Provost also cited as a reason for his decision that Kingsbury "conveyed this allegation directly to at least one student in his Department." Brown's Ex. 7 at 1. Brown has submitted as an exhibit a November 18, 1996, e-mail from Dean Stultz to the Provost which recounts a conversation Stultz had with a former student in the Music Department, Susan Hurley-Glowa, in which Ms. Hurley-Glowa confirmed that Kingsbury had made certain unidentified statements attributed to him in a memorandum which Stultz read to her. See Brown's Ex. 9 at 3 (e-mail from Stultz to Pomerantz of 11/18/96). According to Dean Stultz, after confirming the statements, Ms. Hurley-Glowa further stated that Kingsbury was convinced that there was a conspiracy in the department among some of his colleagues to damage his professional reputation. See id.

This double (if not triple) hearsay attributed to Dean Stultz and Ms. Hurley-Glowa is the only evidence which supports the Provost's conclusion. Brown's SUF does not specifically refer to Ms. Hurley-Glowa's statement, but only asserts that "[t]he Provost conducted an investigation into Kingsbury's assertions to ConFRaT that his unsuccessful

publication efforts were due to a conspiracy by the Music Department faculty." Brown's SUF ¶ 20. Kingsbury disagrees with Brown's SUF ¶ 20, see Response to Brown's SUF ¶ 20. While the court is unable to say that Kingsbury has made a substantial showing that the Provost's statement regarding the student is false, the court notes the hearsay nature of the evidence which supports it. Again, it is not open to the court to resolve credibility matters on summary judgment. See Abraham v. Nagle, 116 F.3d. 11, 15 (1st Cir. 1997).

D. The Sexual Harassment Reprimand

The fourth reason stated by the Provost for Brown's decision not to renew Kingsbury's contract was the reprimand for sexual harassment which he received in 1994. The court does not believe that this reason is susceptible to a showing of falseness in the sense contemplated by the opinion in Williams v. Raytheon Co., 220 F.3d 16, 19 (1st Cir. 2000). There is no dispute here that Kingsbury received the reprimand in 1994. Indeed, the fact that he received the reprimand is part of the basis for his claim of retaliation which is alleged in Count 2. Thus, Kingsbury agrees one of the reasons for the non-renewal of his contract was the sexual harassment reprimand.

Given this somewhat usual circumstance, the court declines to undertake a detailed discussion of the evidence surrounding Ms. Hagedorn's 1991 sexual harassment complaint and then attempt to determine whether Kingsbury has made a substantial showing that he did not sexually harass Ms. Hagedorn and was wrongly reprimanded. In adopting this course, the court is influenced by its finding regarding Count 2, stated infra, that a factfinder could reasonably conclude that the reprimand was issued in retaliation for Kingsbury

filing the complaint with the RICHR on March 28, 1994. Accordingly, the court believes a factfinder may infer a discriminatory motive from Brown's use of that reprimand in 1996 as a ground for not renewing Kingsbury's contract.

VI. Summary of Findings as to Count 1

The court finds that as to the first two reasons expressed by Brown for not renewing Kingsbury's contract, inadequate scholarship and inadequate teaching, he has made a substantial showing that they were false. The determination regarding inadequate teaching is, however, an exceedingly close call. As to the third reason, I find that Kingsbury has made a substantial showing that he did not "strong[ly]" convey, Brown's Ex. 7 at 1, the false impression that his colleagues interfered with the publishing of his work. The court acknowledges that if the adjective "strong" were removed, its conclusion as to this reason might be different. Regarding what the court views as a subpart of the third reason, the alleged conveyance of this allegation to a student, I find that Kingsbury has not made a substantial showing. As to the fourth reason, the reprimand for sexual harassment, I find that Kingsbury does not challenge that it was a reason for the non-renewal of his contract. The court declines for the reasons stated to undertake a further exploration of the facts that gave rise to the complaint.

VII. Conclusion at to Count 1

Based on the findings stated above, I conclude that Kingsbury has made the substantial showing required by Williams v. Raytheon Co., 220 F.3d 16, 19 (1st Cir. 2000), and that Brown's Motion should be denied as to Count 1. I so recommend.

In making the above recommendation, the court is mindful

that:

> In the context of academic tenure cases, [the First Circuit] has been attentive to the need to balance the right of a plaintiff to be free from discrimination against the undesirable result of having the court sit as a "super-tenure committee." See Villanueva v. Wellesley College, 930 F.2d 124, 129 (1st Cir.1991). Thus, plaintiffs who have been denied tenure must show that their qualifications are at least comparable to those of a "middle group of tenure candidates as to whom both a decision granting tenure and a decision denying tenure could be justified as a reasonable exercise of discretion by the tenure-decision making body." Banerjee v. Board of Trustees, 648 F.2d 61, 63 (1st Cir.1981). Aware of the fine balance of competing considerations that preserve academic freedom, [the First Circuit] has noted that "[i]n tenure cases, courts must take special care to preserve the University's autonomy in making lawful tenure decisions." Brown v. Trustees of Boston Univ., 891 F.2d 337, 346 (1st Cir.1989).

Equal Employment Opportunity Comm'n v. Amego, 110 F.3d 135, 145 (1st Cir. 1997). Additionally, this court appreciates that "[w]here the plaintiff has presented no evidence of discriminatory intent, animus, or even pretext, we think there should be special sensitivity to the danger of the court becoming a super-employment committee." Id. Here Kingsbury has presented some evidence of discriminatory animus.

Most significantly, the court has found the following guidance from the First Circuit particularly helpful in this difficult case:

> [W]here a plaintiff in a discrimination case makes out a prima facie case and the issue becomes whether the employer's stated nondiscriminatory reason is a pretext for discrimination, courts must be "particularly cautious" about granting the employer's motion for summary judgment. Stepanischen v. Merchants

> Despatch Transp. Corp., 722 F.2d 922, 928 (1st Cir.1983). Of course, summary judgment is not "'automatically preclude[d]'" even in cases where elusive concepts such as motive or intent are at issue. See DeNovellis [v. Shalala], 124 F.3d [298,] 306 [(1st Cir. 1997)](quoting Valles Velazquez v. Chardon, 736 F.2d 831, 833 (1st Cir.1984)). "[I]f the non-moving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation," summary judgment may be appropriate even where intent is an issue. Smith v. Stratus Computer, Inc., 40 F.3d 11, 12 (1st Cir.1994) (internal quotation marks omitted). **Where, however, the nonmoving party has produced more than that, trial courts "should 'use restraint in granting summary judgment' where discriminatory animus is in issue."** DeNovellis, 124 F.3d at 306 (quoting Valles Velazquez, 736 F.2d at 833); see Stepanischen, 722 F.2d at 928. The role of the trial judge at the summary judgment stage "is not ... to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial." Anderson [v. Liberty Lobby, Inc.], 477 U.S. [242,] 249, 106 S.Ct. 2505 [,2511, 91 L.Ed.2d 202 (U.S. 1986)].

Hodgens v. Gen. Dynamics Corp., 144 F.3d 151, 167 (1st Cir. 1998)(bold added). Kingsbury has produced a quantum of evidence sufficient to warrant that the court exercise restraint in granting the instant motion. See Mesnick v. Gen. Electric Co., 950 F.2d 816, 824 (1st Cir. 1991)("Above all, courts will look at evidence of discrimination not in splendid isolation, but as part of an aggregate package of proof offered by the plaintiff.")

The Retaliation Claim: Count 2

Kingsbury contends that after he filed the charge of discrimination with the Commission for Human Rights, see Plaintiff's Ex. R, Brown retaliated against him by initiating an investigation into the complaint of sexual harassment which

had been filed against him by Hagedorn in 1991, and by issuing him a strong written reprimand in July of 1994 for that alleged sexual harassment, see Brown's Ex. 8, and then using that reprimand in 1996 as one of the reasons for not renewing his contract, see Complaint ¶¶ 32, 35-36, 40-41, 47, 50, 71; Plaintiff's Memorandum of Law ("Plaintiff's Mem.") at 6-7; Plaintiff's SUF ¶¶ 28-30; Brown's Ex., Kingsbury Dep. of 11/19/98 at 204.

I. Applicable Law

> When, in a claim of retaliation, there is no direct evidence of an improper motive, the record should be analyzed with the McDonnell Douglas burden-shifting test. In reviewing an ADA retaliation claim, a court may find guidance in Title VII retaliation claims.
>
> To make out a *prima facie* retaliation claim, a plaintiff must show that he engaged in protected conduct, that he was subject to an adverse employment action, and that there was a causal connection between the adverse action and his protected conduct. Once the plaintiff meets his burden at this stage, the employer has the burden of production to articulate a legitimate, non-retaliatory reason for the employment action. The burden then shifts back to the plaintiff who must show by a preponderance of the evidence that the proffered reason is merely a pretext and that the real reason was the employer's retaliatory animus.
>
> As part of a retaliation claim, a plaintiff must show a causal relationship between his protected activity and the adverse employment action. This showing requires more than mere conjecture and unsupported allegations. The plaintiff must demonstrate the existence of specific facts to enable the factfinder to infer that the employer's proffered reasons were mere pretext for a retaliatory motive. The employer must have taken the adverse action for the purpose of retaliating against the plaintiff. **Close temporal proximity between protected conduct and an adverse employment action may give rise to a permissible inference of retaliation**. Such evidence, however, is

> not conclusive. A court should consider the actions taken against the employee within the overall context and sequence of events. **Other factors that a court should examine include** the historical background of the decision, **any departures from normal procedure**, and contemporary statements by the employer's decision makers.

Cruz v. McAllister Bros., Inc., 52 F.Supp.2d 269, 286 (D.P.R. 1999)(citations omitted)(bold added); see also Randlett v. Shalala, 118 F.3d 857, 862 (1st Cir. 1997); McMillan v. Mass. Soc'y for the Prevention of Cruelty to Animals, 140 F.3d 288, 309 (1st Cir. 1998); Mesnick v. Gen. Elec. Co., 950 F.2d 816, 827 (1st Cir. 1991); Russell v. Enter. Rent-A-Car Co. of Rhode Island, 160 F.Supp.2d 239, 264 (D.R.I. 2001).

II. Prima Facie Case

Brown argues, again in a footnote, that Kingsbury cannot establish a prima facie case because he cannot establish the second and third elements of a retaliation claim. See Brown's Mem. at 14 n.7 It contends that "the lack of close temporal proximity and the overall context and sequence of events indicates that there is no causal connection between Kingsbury's filing of a complaint and Brown's decision not to renew his contract." Id. Additionally, Brown asserts that the basis for the University's decision not to renew his contract was his "inadequate performance as a scholar and teacher ...." Id. at 15 n.7. Thus, Brown proclaims that "there is simply no connection between Brown's decision and Kingsbury's first charge of discrimination." Id.

The court disagrees that Kingsbury is unable to establish a prima facie case of retaliation. While it is true that there is no close temporal proximity between the filing of the RICHR charge in March of 1994 and the decision not to renew

Kingsbury's contract in November of 1996, there is a nearness in time between the filing of that charge and the initiation of the investigation which resulted in the issuance of the written reprimand in July of 1994. Because that reprimand was one of the reasons cited by the Provost for not renewing Kingsbury's contract, there is a sufficient connection between the non-renewal of Kingsbury's contract and his filing of his first charge of discrimination. I find that Kingsbury has made out a prima facie case.

III. Brown's Argument

Brown further argues that even if Kingsbury can establish a prima facie case, his retaliation claim fails because he cannot point to any evidence that retaliatory animus motivated the decision not to renew his contract. See Brown's Mem. at 14-15. This, according to Brown, is because the decision not to renew his contract was based on its assessment that Kingsbury did not meet its standards as a teacher or a scholar. See id. at 15.

In making the latter statement, Brown overlooks the fact that the written reprimand given Kingsbury was one of the reasons stated for the non-renewal of his contract. While the Provost stated that the primary reason for the University's action was Kingsbury's "scholarly performance," Brown's Ex. 7 at 2, it is also clear that the letter of reprimand for the 1991 incident was a "not insignificant," id., factor. Thus, if Plaintiff can make a showing that the letter of reprimand flowed from his filing of the complaint with the RICHR, the fact that Brown later used that letter as a basis for the non-renewal of his contract is evidence of continuing retaliation against Kingsbury for having filed his complaint.

IV. Issue

Accordingly, the issue to be determined is whether Kingsbury can demonstrate the existence of specific facts which would enable a factfinder to conclude that Brown's reasons for initiating the investigation of the sexual harassment complaint and subsequently issuing the reprimand were pretext for its true motive of retaliation against him for filing the RICHR charge. See Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 57 (1st Cir. 2000); DeNovellis v. Shalala, 135 F.3d 58, 65 (1st Cir. 1998); Russell v. Enter. Rent-A-Car Co. of Rhode Island, 160 F.Supp.2d 239, 264 (D.R.I. 2001).

V. Court's Analysis

Brown has not specifically articulated the reason(s) why it initiated the investigation of sexual harassment against Kingsbury and subsequently reprimanded him. See Cruz v. McAllister Bros., Inc., 52 F.Supp.2d 269, 286 (D.P.R. 1999) (noting employer's burden to articulate a legitimate, non-retaliatory reason for the employment action)(citing Provencher v. CVS Pharmacy, 145 F.3d 5, 10 (1st Cir. 1998); McMillan v. Mass. Soc'y for the Prevention of Cruelty to Animals, 140 F.3d 288, 309 (1st Cir. 1998)). However, it is safe to assume that Brown's reason is that Ms. Hagedorn filed a written complaint and that Brown's investigation of that complaint determined that it was valid and that the reprimand was warranted. The burden now shifts to Kingsbury who must show by a preponderance of the evidence that the proffered reason is merely a pretext and the real reason was Brown's retaliatory animus. See Cruz, 52 F.Supp.2d at 286 (citing McMillan, 140 F.3d at 309; Champagne v. Servistar Corp., 138 F.3d 7, 12-13 (1st Cir. 1998)).

The court finds that there are specific facts in the

record which would allow the factfinder to infer that Brown's reason(s) for initiating the investigation and issuing the letter of reprimand were pretext for a retaliatory motive. See DeNovellis v. Shalala, 135 F.3d 58, 65 (1st Cir. 1998). First, Kingsbury points to the close temporal proximity between the filing of his complaint with RICHR on March 28, 1994, and Brown's sudden (and belated[28]) response to Hagedorn's request for reactivation of her complaint and the subsequent initiation of an investigation and issuance of the reprimand. See Hodgens v. Gen. Dynamics Corp., 144 F.3d 151, 168 (1st Cir. 1998)("[P]rotected conduct closely followed by adverse action may justify an inference of retaliatory motive ...."))(internal quotation marks omitted); Russell v. Enter. Rent-A-Car Co. of Rhode Island, 160 F.Supp.2d 239, 264-65 (D.R.I. 2001)(stating that if plaintiff's complaints to employer about offensive conduct by employees which created hostile work environment coincided with offering of adverse employment options she is entitled to a presumption that her protected acts of complaining about discriminatory treatment caused the discharge).

Second, Provost Rothman's explanation to Hagedorn as to why Brown had chosen that particular point in time to act on her months old request does not ring true. In his letter Provost Rothman stated: "Since it is apparent that Professor Kingsbury is seeking to return to active duty at Brown University, I believe it is appropriate to proceed with the investigation of your complaint." See Plaintiff's Ex. S. However, Kingsbury had been actively seeking reinstatement to

[28] The court rejects Brown's assertion that the University "commenced its investigation immediately upon Hagedorn's reactivation of her charge." Brown's Mem. at 5.

the faculty since at least April of 1993, see Complaint ¶ 13; Brown's SUF ¶ 3; Response to Brown's SUF ¶ 13, and, probably, even earlier, see Plaintiff's Ex. N at 4 (reflecting demand by Attorney Dennis for "full back- pay and employment benefits from February 1993 and continuing ...."). That is why he underwent the medical examination by Dr. Glantz in June of 1993. See Brown's Ex. 14 at 21. Brown orally denied Kingsbury's request for reinstatement on August 23, 1993, and again formally in writing on August 30, 1993. See Plaintiff's Ex. L at 2. Moreover, Kingsbury did not meekly accept Brown's decision but actively challenged it. See Brown's Ex. 14 at 7 (Mem. from Josephson to Baker of 9/28/93), 10 (Letter from Kingsbury to Colleagues of 9/12/93), 19 (Statement by Kingsbury of 9/2/93), 24 (Letter from Kingsbury to Attorney Mark Hagopian of 9/8/93). On October 8, 1993, his retained legal counsel sent Brown a strong letter, accusing the University of illegal discrimination and demanding reinstatement. See Plaintiff's Ex. N at 4. Thus, the implication by Provost Rothman that it had become "apparent" to Brown only by April of 1994 that Kingsbury was seeking to return to active duty is unsupportable. Cf. Fite v. Digital Equip. Corp., 232 F.3d 3, 7 (1st Cir. 2000) ("[T]he falsity of the employer's explanation may permit the jury to infer a discriminatory motive ....")(internal quotation marks omitted).

Third, the very next statement in Rothman's letter, "[a]s other matters with regard to Professor Kingsbury are also pending," Plaintiff's Ex. S, appears to be a veiled reference

to the recently filed charged at the RICHR.[29]

Fourth, Kingsbury has presented evidence of at least three departures from normal procedure regarding Hagedorn's complaint. After receiving it, Brown did not "attempt to resolve the complaint as promptly as possible," Plaintiff's Ex. FF at 4, contrary to the Faculty Rules and Regulations. Additionally, Kingsbury was not informed in writing of the allegation until May 25, 1994, more than six weeks after Provost Rothman's letter to Hagedorn and more than six months after Hagedorn had reactivated her complaint. See Plaintiff's Ex. L at 1. The Faculty Rules require such notification, see Plaintiff's Ex. FF at 4, and the delay in providing it to Kingsbury clearly is contrary to Brown's obligation to resolve such complaints promptly as possible. Third, also contrary to

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[29] The court is aware that Plaintiff's Ex. R, a copy of the letter from the RICHR to Brown's President, bears two date stamps. One indicates receipt of the document by Brown's General Counsel on April 7, 1994, and the other indicates receipt by an unidentified entity also on April 7, 1994. If Brown did not receive the letter until April 7th, it weakens, but does not eliminate, the inference that the "other matters" to which Provost Rothman refers includes Kingsbury's RICHR charge. Brown could have learned of the charge by other means or channels. If the charge was actually filed on March 24, 1994, as Kingsbury claims in Plaintiff's SUF ¶ 28, see n.14, this possibility is increased even further.

Moreover, even if Provost Rothman did not know of the RICHR charge when he wrote to Hagedorn on April 6, 1994, he clearly knew of it by the time he directed Associate Dean Stultz to conduct a formal investigation of her complaint in May of 1994. See Plaintiff's Ex. L at 1 (Letter from Stultz to Kingsbury of 5/25/94 informing him of Hagedorn's complaint and that the Provost has asked him to conduct an investigation of it). The initiation of a formal investigation, coming only a few weeks after Kingsbury filed his complaint, see Complaint ¶ 36, still raises an inference of retaliatory animus. This inference is strengthened when the violations of procedures provided in the Faculty Rules and Regulations for the investigation of sexual harassment complaints against faculty members are considered. They are discussed in the text which follows.

the explicit requirement of the Rules, see id., Kingsbury was never provided with a copy of Hagedorn's complaint, see Complaint ¶ 38 ("At no time during Brown's investigation was I shown a copy of the student's charge against me; this constitutes a violation of the Brown University Faculty Rules and Regulations ...."). In assessing discriminatory motives, a court may consider "any departures from normal procedure ...." Cruz v. McAllister Bros., Inc., 52 F.Supp.2d 269, 286 (D.P.R. 1999); see also Hodgens v. Gen. Dynamics Corp., 144 F.3d 151, 168-69 (1st Cir. 1998).

VI. Conclusion Re Count 2

For the reason stated in the preceding section, I find that Kingsbury has made a colorable showing that a causal connection existed between his filing of the RICHR complaint and the subsequent issue of the written reprimand for sexual harassment which was later used a reason for not renewing his contract. See Randlett v. Shalala, 118 F.3d 857, 862 (1st Cir. 1997)("To make out a retaliation claim requires not only an adverse employment action, but also a colorable showing that "a causal connection existed between the protected conduct and the adverse action"). Accordingly, as to Count 2 Brown's Motion should be denied, and I so recommend.

Conclusion

For the foregoing reasons, I recommend that Brown's Motion for Summary Judgment pursuant to Fed. R. Civ. P. 56 be denied. Any objections to this Report and Recommendation must be specific and must be filed with the Clerk of Court within ten (10) days of its receipt. See Fed R. Civ. P. 72(b); D.R.I. Local R. 32. Failure to file specific objections in a timely manner constitutes waiver of the right to review by the district court and of the right to appeal the

district court's decision. See United States v. Valencia-Copete, 792 F.2d 4, 6 (1st Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

David L. Martin
United States Magistrate Judge
September 30, 2003